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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

RUSSELL L. RUNYON, *et ux*, *Petitioners*,

v.

MICHAEL C. McCRARY, etc., *et al.*, *Respondents*.

FAIRFAX-BREWSTER SCHOOL, INC., *Petitioner*,

v.

COLIN M. GONZALES, etc., *et al.*, *Respondents*.

SOUTHERN INDEPENDENT SCHOOL ASSOCIATION, *Petitioner*,

v.

MICHAEL C. McCRARY, etc., *et al.*, *Respondents*.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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No. 75-62

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURT CIRCUIT

BRIEF FOR THE RESPONDENTS[1]

OPINIONS BELOW

The opinion of the court of appeals, sitting *en banc*, and its order amending the opinion (A. 4-34, 40-42)[2] are reported

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[1] Respondents in these three consolidated cases, in addition to Michael C. McCrary and Colin M. Gonzales, infants who sued through their respective parents, include their parents, Curtis L. McCrary and Sandra McCrary, and Raymond Gonzales and Margaret R. Gonzales.

By order of the Court, these three cases are consolidated with No. 75-306. All four cases seek review of the same proceeding below.

[2] "A." refers to the single appendix. References preceding a semicolon are to findings of the courts below; those following are to the supporting evidence.

at 515 F.2d 1082. The memorandum opinion and order of the district court which issued July 27, 1973 (A. 133-142) is reported at 363 F. Supp. 1200. A memorandum opinion and order of the district court which issued April 16, 1973 (A. 119-120) is unreported.

JURISDICTION

The judgments of the court of appeals in the consolidated cases below (A. 35-39) were entered on April 15, 1975. Petitions for rehearing were denied by order of the court of appeals filed on May 29, 1975 (A. 40-42). The petitions for writs of certiorari were filed on July 10, July 11, and August 22, 1975, respectively, and were granted on November 11, 1975. The jurisdiction of this Court rests on 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether privately owned educational institutions are prohibited by 42 U.S.C. Sec. 1981 from denying admission to qualified black students on the basis of their race.

2. Whether the injunctive relief granted by the district court against Fairfax-Brewster School is valid and proper.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Thirteenth Amendment

Section 1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall

have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

* * *

42 U.S.C. Sec. 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT

These proceedings arise out of two cases that were consolidated in the district court and in the court of appeals. The plaintiffs in both cases are Negro children and their parents who seek relief for violation of their civil rights guaranteed by the Thirteenth Amendment to the Constitution, as implemented by 42 U.S.C. Sec. 1981. The courts below upheld plaintiffs' contentions that the defendant schools, Fairfax-Brewster School, Inc., and Russell L. Runyon and Katheryne E. Runyon, d/b/a Bobbe's Private School, violated plaintiffs' rights under 42 U.S.C. Sec. 1981 by denying admission to the two children, Colin M. Gonzales and Michael C. McCrary because of their race or color. The relevant facts, as found by the district court and affirmed by the court of appeals, are as follows:

A. Fairfax-Brewster School – its racially discriminatory admission policy

Fairfax-Brewster School is located in Fairfax County, Virginia, where it operates a school program consisting of pre-primary through sixth grade, as well as a summer camp program (A. 7; 59). In the 1972-1973 academic year the school had an enrollment of 223, and in 1972 the camp enrollment was 236 (A. 134; 60). Fairfax-Brewster School does not receive governmental funds or assistance and is supported entirely by tuition paid by the families of students (A. 134). It solicits students by advertising in the Yellow Pages of the telephone directory and by direct mail advertising addressed to "Resident" at specified addresses (A. 7; 74, 176).

In early May 1969, Mr. and Mrs. Gonzales contacted Fairfax-Brewster about enrolling their son, Colin, age 5-½, in the school's summer day camp program and continuing in the first grade in the fall (A. 7; 176-177). The Gonzales' had learned of the school through its advertisement in the Yellow Pages, through an advertisement received in the mail, and from a friend whose son had attended the summer camp. Thereafter, the Gonzales' visited the school with Colin and were shown around (A. 7-8; 177-179). Being pleased with what they saw, the Gonzales' completed the application form for admission, and submitted it along with a required medical certificate prepared by their doctor and a registration fee (A. 8; 180).[3]

[3] The application form as well as the acceptance form used by the school specify in detail the terms of what is designated as the "Enrollment Contract" between the parties (A. 63-66, 70-72).

On May 16, 1969, the medical certificate and fee were returned to the Gonzales' accompanied by a form letter stating that the school was "unable to accommodate the application." No further explanation was given (A. 8; 73). Mr. Gonzales then called the school and spoke to someone identified as Captain Stuart A. Reiss, Chairman of the Board.[4] In response to Mr. Gonzales' inquiry as to why his son's application was rejected, he was told "we are not integrated" (A. 8; 166, 210-211).

Fairfax-Brewster School's policy of excluding Negroes was corroborated by Mrs. Marjorie Bryant, who, in January 1972, telephone the school about enrolling her 4-year-old son, Grady Bryant (A. 10; 221-222). When Mrs. Bryant indicated that her son was black, she was told he could not attend the school because of his race (A. 10; 222-223).

B. Bobbe's Private School – its racially discriminatory admission policy

Bobbe's Private School is located in Arlington County, Virginia, where it operates a school program consisting of pre-primary through second grade, as well as a summer camp program (A. 134; 258). The school's average enrollment is 200 pupils and the average camp enrollment is 100 (A. 134; 108, 112). Bobbe's School does not receive governmental funds or assistance and relies for funding entirely on tuition paid by the families of students (A. 134). The school advertises in the Yellow Pages of the telephone

[4] Captain Reiss' son, Robert S. Reiss is Director of the school, and his daughter-in-law, Olga M. Reiss, is Registrar (A. 8; 239, 246).

directory and also solicits students by direct mail advertising (A. 136; 212, 220-221, 223, 226-227).[5]

In mid-May 1969, subsequent to Colin Gonzales' rejection by Fairfax-Brewster School, Mr. Gonzales, responding to the advertisement of Bobbe's School in the classified directory, telephoned the school (A. 8; 212). Mr. Gonzales stated that he was interested in enrolling his son and in response to his inquiry as to whether the school was integrated was told by the spokesman that only members of the Caucasian race were accepted (A. 8; 212-213).

In August 1972, Mrs. Sandra McCrary, in response to the advertisement of Bobbe's School in the classified directory, telephoned the school about enrolling her 2-year old son, Michael, in the nursery school program (A. 8; 226-227). After first inquiring about the cost, the program, meals, transportation and facilities for "toilet training", she asked if the school was integrated (A. 8; 227). Upon receiving a negative reply, she asked if the school accepted black children. The answer again was "no" (A 8; 227-228).

The policy of Bobbe's Private School of excluding blacks was corroborated by Mrs. Marjorie Bryant, who, in January 1972, after being turned away by Fairfax-Brewster School, called Bobbe's School about enrolling her 4-year-old son, Grady (A. 10; 223). When she indicated that her son was black, Mrs. Bryant was told he could not attend the school because of his race (A. 10; 224).

Similarly, Mr. Marshall Brooks, who works for the Navy Department and is Mrs. McCrary's supervisor, called Bobbe's

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[5] As part of enrolling a child in Bobbe's School completed application and medical forms must be furnished by the parents (A. 143, 148A).

School after he became aware of the pendency of this suit, to find out for himself about the school's policy (A. 10; 263-264). In a telephone converation on May 31, 1973, with the school's superintendent, William C. Gates, Brooks asked whether the school was integrated (A. 10; 264-265). Upon receiving a negative response, Brooks further asked if blacks were admitted. He was told "no" (A. 10; 265).

C. Proceedings below

The district court concluded that Colin Gonzales and Michael McCrary were excluded from the schools and day camp operated by the defendants because they are black, and that the rights of the two children and their parents under 42 U.S.C. Sec. 1981, were thereby violated. The district court enjoined the defendants from continuing to discriminate concerning the admission of students on the basis of race. The court also awarded compensatory damages for the embarrassment, humiliation and mental anguish suffered by the plaintiffs, as well as attorneys' fees. Fairfax-Brewster School was ordered to pay $2,000 damages to Colin Gonzales and $1,000 attorneys' fees. Bobbe's School was ordered to pay $1,000 damages to Michael McCrary, $2,000 to his parents, and $500 to Colin Gonzales, as well as $1,000 attorneys' fees (A. 142). The court denied damages to Mr. and Mrs. Gonzales on the ground that their suit was filed three and one-half years after the discrimination against them occurred and that their claims for damages against the schools were therefore barred by Virginia's two-year statute of limitations. Sec. 8-24, Code of Virginia (1950) (A. 119-120).

The court of appeals, sitting *en banc* and with three judges dissenting, found "ample evidence" in the record to

support the district court's findings that Colin Gonzales and Michael McCrary were excluded from the two schools on grounds of race (A. 10). The court of appeals also agreed with the district court's conclusion that plaintiff's rights under 42 U.S.C. Sec. 1981 were thereby violated. The court of appeals affirmed the district court's award of damages to the individual plaintiffs, as well as the denial of damages to Mr. and Mrs. Gonzales on the ground that their claim was barred by Virginia's two-year statute of limitations (A. 17-18, 41). Finally, the court of appeals, with three judges dissenting, reversed the district court's award of attorneys' fees to plaintiffs. The three judges dissenting on this issue would have affirmed the award of fees to plaintiffs under the "bad faith" exception to the general rule that such fees are not awarded to a prevailing litigant (A. 18-22, 24, 42). The dissenting judges felt that the award of fees was justified by the district court's finding that officials of the defendant schools did not testify truthfully concerning their discriminatory practices.

SUMMARY OF ARGUMENT

I.

A. The language of 42 U.S.C. Sec. 1981, which guarantees all persons "the same right . . . to make and enforce contracts "as is enjoyed by whites, derives from the Civil Rights Act of 1866 and the validity of the section is established by the decisions of this Court. It is clear that the section prohibits discrimination by private parties, and was not intended by Congress only to be a limitation on state action. The decisions of this Court make clear that Sec. 1981 is a valid exercise of congressional power under the Enabling Clause of the Thirteenth Amendment.

Sec. 1981 is to be read literally, and it thus means that when the defendant schools refused to enter into contracts

with the plaintiffs because of their race, plaintiffs were denied "the same right" to make contracts that is available to whites. Sec. 1981's prohibition against racial discrimination in the making of contracts, does not compel unwilling parties to make contracts, but only prohibits a person who makes an offer to contract from making race or color a condition of the offer. "The statutory obligation thus created to treat all persons without distinction is no different than the obligations imposed by civil rights and anti-discrimination laws that have been in existence for many years. Such laws have been upheld repeatedly by the courts against claims that they interfered with constitutional rights of personal liberty and resulted in the taking of property without just compensation.

The term "contracts" as it appears in Sec. 1981 is also to be read in its literal sense, and thus there is no basis for the assertion that it does not encompass contracts such as those entered into between nonpublic schools and parents who enroll their children in such schools. The legislative history of the Reconstruction Acts sheds little light on the kinds of contracts that Congress intended to be covered by Sec. 1981. Accordingly, as indicated by the decisions of this and other courts, the statutory provision should be construed according to present-day conditions. Following this principle, Sec. 1981 has been applied to a variety of contractual relationships that could not have been anticipated by the Reconstruction Congress, and which provide ample precedent for applying it to the school contracts here at issue. Congress recently affirmed this literal construction of the term "contracts" in Sec. 1981, when it rejected efforts, while it was considering the Equal Employment Act of 1972, to make Sec. 1981 inapplicable to contracts of employment.

B. The decisions of this Court teach that a facility that holds itself open to the general public and has no "plan or purpose of exclusiveness" cannot claim exemption from the civil rights laws on the ground that it is "private". Application of this standard to the defendant schools forecloses any claim that they are exempt from Sec. 1981, for the record shows that they publicly advertise for students in the Yellow Pages and through direct mail solicitation. Nor is it of significance that an applicant for admission must meet prescribed qualifications, for a facility is no less open to the public merely because it requires its patrons to to conform to certain standards. It is apparent that the defendant schools are essentially commercial enterprises selling a commodity – education – and hence are no different than other types of enterprises subject to the civil rights laws.

The education of children has long been recognized as a matter involving the public interest, and hence nonpublic schools have been the subject of considerable governmental regulation. This was most recently demonstrated when Congress, as part of the Equal Employment Opportunity Act of 1972, extended Title VII of the 1964 Civil Rights Act to public, as well as nonpublic schools, thereby prohibiting schools of the type involved here, provided they have 15 or more employees, from discriminating in employment on the basis of race, color, religion, sex or national origin. In addition, the decisions of this Court give recognition to the right of states reasonably to regulate nonpublic schools. Among the most common types of state regulation are requirements concerning curriculum, and standards relating to qualifications and certification of teachers. Recent years have also seen the enactment by a substantial number of states of anti-discrimination laws which prohibit nonpublic schools from engaging in discri-

minatory admission practices. There is no reason to believe that these state laws are less valid than the many state and local measures of similar nature that are applicable to other types of enterprises.

There is no merit to claims that application of Sec. 1981 to nonpublic schools interferes with constitutional rights of privacy and freedom of association. Although this Court has held that parents may not be compelled to send their children to public schools, it is equally clear that parents do not have an unfettered right to educate their children as they see fit. Thus, for example, compulsory attendance laws commonly provide that if a child does not attend public school, it must be enrolled in a program where it will receive a specified equivalent education. Similarly, although private bias is not barred by the Constitution, Congress may, in the exercise of its authority under the Thirteenth Amendment, prohibit schools such as those involved here from discriminating on the basis of race. Such congressional action does not violate the constitutional rights of association of persons who patronize such schools, since the freedom of association that has been recognized by this Court is closely linked with the freedoms of speech and assembly that are commonly exercised to promote political or social ideas. Schools are apolitical and the purpose they serve is to provide education, not to advance political or social interests. Likewise, the constitutional right of privacy is not involved here, for that has been recognized only in cases where intimate or familial relationships are involved. Schools that advertise publicly for students are not the type of institution that can claim a constitutional right of privacy. Finally, there is no basis for the assertion that parents who send their children to a segregated school in the belief that this is a desirable form of education are thereby engaged in a pro-

tected form of expression. Assuming, there are parents who consider themselves engaged in expressing a belief when they send their child to a segregated school, that does not entitle their conduct to constitutional protection. It is well settled that where conduct is more action than expression, it is subject to governmental regulation, and this would be particularly true here, in view of the affirmative mandate of the Thirteenth Amendment to eradicate the badges and incidents of slavery.

II.

The injunction granted by the district court against Fairfax-Brewster School is valid and proper. The complaint stated a proper class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure, on behalf of the Negro plaintiffs and other Negroes similarly situated. The injunction issued by the district court not only enjoins Fairfax-Brewster from discriminating against Colin Gonzales on the basis of race, but enjoins the school from discriminating against other persons on racial grounds as well. The validity of the injunction is not impaired by the fact that by the time it was issued the Gonzales' had moved out of the area and Colin was not likely to seek admission to the school in the future, or the fact that he is now beyond the age where he would be eligible to attend the school. As this Court recently held, even where the claim of a named plaintiff has become moot, injunctive relief is still warranted if the controversy between a named defendant and members of the class still exists.

ARGUMENT

I. PRIVATELY OWNED EDUCATIONAL INSTITUTIONS ARE PROHIBITED BY 42 U.S.C. SEC. 1981 FROM DENYING ADMISSION TO QUALIFIED BLACK STUDENTS ON THE BASIS OF THEIR RACE.

A. Section 1981's Proscription Against Racial Discrimination is Applicable to Privately Owned Schools.

The court of appeals was plainly correct in holding that plaintiffs' rights guaranteed by 42 U.S.C. Sec. 1981 were violated as a result of the racially discriminatory admission policies of the defendant schools. That statutory provision, by its terms, guarantees all persons the same right "to make and enforce contracts" as in enjoyed by whites. The "operative language" of Sec. 1981 is traceable to the Civil Rights Act of 1866, 14 Stat. 27, and the section's validity is firmly established by this Court's decision in *Tillman v. Wheaton-Haven Recreation Association,* 410 U.S. 431, 439-440 (1973), and *Johnson v. Railway Express Agency,* 421 U.S. 454, 459-460 (1975). As the Court confirmed in the cited cases, Sec. 1981 in its present form is derived from the Act of May 31, 1870, Secs. 16, 18, 16 Stat. 144, which re-enacted the 1866 Act and specified the manner of its enforcement. Sec. 1981 is a companion of 42 U.S.C. Sec. 1982, both sections having originally been part of Sec. 1 of the Civil Rights Act of 1866. Sec. 1982 was upheld by this Court as a proper exercise of congressional power under the Thirteenth Amendment in *Jones v. Mayer Co.,* 392 U.S. 409 (1968). See also *Sullivan v. Little Hunting Park,* 396 U.S. 229, 235-236 (1969).

In view of the common ancestry of Secs. 1981 and 1982, they obviously warrant a like construction. Thus, Sec. 1981, like Sec. 1982, is not merely a limitation on state action,

but it prohibits discrimination by private parties as well. *Jones, supra,* 392 U.S. at 413. And see *District of Columbia v. Carter,* 409 U.S. 418, 422 (1973). Sec. 1982 proscribes discriminatory barriers to the acquisition of real and personal property.[6] Sec. 1981, on the other hand, is a guarantee that Negroes will not be discriminated against in transactions based on contract. Both sections were enacted pursuant to authority granted to Congress under the Enabling Clause of the Thirteenth Amendment. That clause "clothed 'Congress with power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States." *Jones, supra,* 392 U.S. at 439, quoting *Civil Rights Cases,* 109 U.S. 3, 20 (1883). The determination of what are the badges and incidents of slavery is a matter within Congress' sphere. In *Jones* the Court held that it was not irrational for Congress to conclude that they encompassed restraints on the acquisition of property. 392 U.S. at 440-441. Other cases make clear that it was equally reasonable for Congress to conclude, as it did, that included among the badges and incidents of slavery was the inability of Negroes to make and enforce contracts. *Tillman, supra,* 410 U.S. at 439-440; *Johnson, supra,* 421 U.S. at 459-460.

Notwithstanding the Court's explicit holding in *Jones v. Mayer Co.*, that Sec. 1 of the Civil Rights Act of 1866 prohibited not just state imposed discrimination but private discrimination as well, defendant Fairfax-Brewster

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[6] Sec. 1982 provides:

> All citizens of the United States shall have the same right in every State and Territory, as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold, and convey real and personal property.

argues (Br. 13, 50) that the discrimination practiced by it is not proscribed by Sec. 1981 because the only effect of the 1866 Act was to nullify the Black Codes enacted by former Confederate States following the Civil War. This argument can hardly be taken seriously, for the decisions in *Jones, Tillman* and *Johnson* show it to be totally without merit. In *Jones* the Court noted that the legislative history of the 1866 Act contains numerous "references to private injustices against Negroes – references to white employers who refused to pay their Negro workers, white planters who agreed among themselves not to hire freed slaves without permission of their former masters, white citizens who assaulted Negroes or who combined to drive them out of their communities." 392 U.S. 427-428. In 1866, Congress had before it extensive evidence of private hostility, persecution and discrimination directed at Negroes. Proposals for a narrower enactment aimed only at discriminatory state laws were rejected. Accordingly, this Court concluded in *Jones* that based on the record of the congressional proceedings, "it is clear that the Act was designed to do just what its terms suggest: to prohibit all racial discrimination, whether or not under color of law, with respect to the rights enumerated therein . . ." 392 U.S. at 436.

Another contention upon which Fairfax-Brewster and the intervenor place major reliance was also specifically rejected by the Court in *Jones.* Thus, Fairfax-Brewster argues that by adopting the 1866 Act Congress did not intend to grant Negroes the power to coerce unwilling persons to enter into contracts with them (Br. 13, 49). The intervenor similarly asserts that a contract by definition is a consensual agreement and that Sec. 1981 was improperly construed by the courts below as granting to "plaintiffs the right to compel

the making of an agreement by an unwilling private contractor" (Br. 16-17). However, in *Jones* the Court ruled that the requirements of the 1866 Act must be read literally. Thus, taken together, Sec. 1981 and Sec. 1982 declare that all persons shall have "the same right" as is enjoyed by white citizens to make and enforce contracts, and to purchase and lease property. Referring to Sec. 1982, the Court stated in *Jones* (at 392 U.S. at 421):

> [W]henever property is placed on the market for whites only, whites have a right denied to Negroes [citation omitted]. So long as a Negro citizen who wants to buy or rent a home can be turned away simply because he is not white, he cannot be said to enjoy "the *same* right . . . as is enjoyed by white citizens . . . to . . . purchase [and] lease . . . real and personal property." [Emphasis in original.]

It is obvious that the Court's literal construction of Sec. 1982 is controlling with respect to Sec. 1981, which also speaks of all persons haveing "the same right" as whites. By maintaining their racially discriminatory policies, the defendant schools plainly denied the McCrary and Gonzales families "the same right" to enter into contracts of enrollment for their children that is offered whites.

To say that the defendant schools may not deny blacks the same right of enrollment that is available to whites does not create "compulsory" contracts or run counter to accepted standards of law, as defendants assert.[7] A school that makes a public offer to accept students for enrollment

[7] Fairfax-Brewster's brief 13.

and has its offer accepted can hardly call itself an "unwilling" contractor,[8] since by making the offer it signifies its willingness to enter into a contract. The effect of Sec. 1981 is merely to prohibit the school from making race or color a condition of its offer. The statutory obligation thus created to treat without distinction everyone who accepts the offer is not unlike the common law obligation of innkeepers to provide accommodations for everyone who presents himself as a guest (*Rogers v. Loether,* 467 F.2d 1110, 1117 (C.A. 7, 1972), aff'd on other grounds, *sub nom., Curtis v. Loether,* 415 U.S. 189, 195-196, n. 10 (1974)) and the similar obligation of common carriers to accept all persons who present themselves for carriage. *Pearson v. Duane,* 71 U.S. 605, 615 (1866). Arguments such as those made by defendants were rejected in *Heart of Atlanta Motel v. United States,* 379 U.S. 241 (1964) where the Court upheld the public accommodation provisions of the Civil Rights Act of 1964 (42 U.S.C. 2000a, 78 Stat. 243) as a valid exercise of congressional power under the Commerce Clause. It was there contended that the statutory requirement that establishments covered by the Act not discriminate in the provision of goods and services deprived those establishments of liberty or property under the Fifth Amendment. The Court, however, after finding that Congress had a rational basis for proscribing racial discrimination and chose a reasonable means for doing so, dismissed the Fifth Amendment contention, declaring that a covered establishment "has no 'right' to select its [patrons] as it sees fit free from governmental regulation" 379 U.S. at 259. As support for its holding, the Court pointed to the fact that 32 states at that time had public accommodations laws, some dating back many years,

[8] Intervenor's brief 16.

and that it had repeatedly upheld such laws in the face of claims that they violated the Due Process Clause of the Fourteenth Amendment, interfered with personal liberty, and resulted in the taking of property without just compensation. 379 U.S. at 260-261, and cases cited. See also *Railway Mail Association v. Corsi*, 326 U.S. 88, 93-94 (1945).[9]

Pointing to the legislative proceedings leading to passage of the Civil Rights Act of 1866, defendants and the intervenor further argue that Congress did not intend the provisions now contained in Sec. 1981 to apply to schools. In part, this contention is based on their claim that the

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[9] Reliance is placed by defendant Runyon (Br. 8) and the intervenor (Br. 16-17) on *Cook v. Advertiser Company*, 323 F. Supp. 1212 (M.D. Ala., 1971), aff'd, 458 F.2d 1119 (C.A. 5, 1972), the former citing the district court's ruling and the latter citing the court of appeals' opinion. However, that case is completely inapposite here. The district court's decision is of no precedential importance, because it takes the view, since overruled by this Court in *Tillman, supra*, and *Johnson, supra*, that Sec. 1981 only reaches state action and does not prohibit private acts of discrimination. See discussion *supra*, pp. 14-15. The court of appeals held in *Cook* that no enforceable contract is involved when a wedding announcement is submitted to a newspaper and rather than print it on the regular society page, the announcement, because it concerns Negroes, is printed on a Negro news page. Both the majority and concurring opinions reflect concern with First Amendment considerations and the fact that if the court held the newspaper's standing offer to receive wedding announcements implied an agreement to publish them, the court would be dictating what the newspaper was to publish. Accordingly, the court held, since whites had no contract right to have announcements published, Negroes were not discriminated against with respect to a right enjoyed by whites. By contrast, in the case at bar the relationship between the defendant schools and pupils accepted for enrollment is unquestionably based on an enforceable contract.

1866 Act was only intended by Congress to abrogate the Black Codes and not to reach private discrimination at all, but as shown *supra*, p. 15, the Court, drawing from the record of the congressional proceedings, held to the contrary in *Jones, supra*. Reliance is also placed by Fairfax-Brewster (Br. 36-37) and the intervenor (Br. 22) on a statement by Congressman Wilson, floor manager of the legislation, in which he stated that the bill provided for the equality of all citizens in the enjoyment of "civil rights and immunities" and went on to explain that by use of that term he did not mean that the bill gave Negroes, the right to vote, to serve on juries or to attend schools with whites. 36 Cong. Globe, 39th Cong., 1st Sess. 1117 (1866). However, this isolated mention of schools found in the congressional debates provides no support for defendants' position here, for it is clear from the context of Congressman Wilson's enumeration of juries, schools and voting rights, that he was referring to matters which at that time were understood to be subject to state control. Indeed, Fairfax-Brewster, at pages 33-34 of its brief, quotes from a speech by Senator Cowan of Pennsylvania in which he expressed concern that the bill not disturb a racially segregated school system that had been established by his state's legislature. 36 Cong. Globe, 39th Cong., 1st Sess. 500 (1866). Aside from the fact that they are obviously outmoded under present consitutional doctrine, these congressional statements were directed at the effect the proposed legislation would have on state laws, and shed no light on what Congress meant to be encompassed by the right "to make and enforce contracts" which was guaranteed by Sec. 1 of the 1866 Act.[10]

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[10] As the Court noted in *Brown v. Board of Education*, 347 U.S. 483, 489-490 (1954), Congress' views concerning the intended

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A search of the legislative history of the 1866 Act reveals nothing more than that Congress intended what it said – t' ·t the word "contracts" is used in the statute according to its usual meaning. Hence, the term as it appears today in Sec. 1981 must be read literally. This is the rule of construction followed in *Jones v. Mayer, supra,* where the Court held with respect to Sec. 1982 that "Congress meant exactly what it said." 392 U.S. at 422. Certainly, the fact that Congress did not specify the various

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10 (continued)
effect of the Reconstruction Amendments on segregated schools are difficult to ascertain from the congressional debates of the period and "[a]t best they are inconclusive." It is noteworthy, however, that one of the reasons urged for adoption of the Thirteenth Amendment was that it would eradicate the conditions of ignorance and illiteracy in which slaves were kept. Senator Johnson of Maryland, a supporter of the amendment, asked rhetorically on the Senate floor, "Why are these poor creatures kept in a state of absolute ignorance?" 34 Cong. Globe, 38th Cong., 1st Sess. 1424 (1864). He answered his own query by commenting that lack of education was used to keep slaves unaware of the potentiality of a free existence, and that if they were educated they would demand their freedom. *Ibid.* Senator Harlan of Iowa also declared that continuance of slavery "requires the perpetuity of the ignorance of its victims." *Id.* at 1439. Therefore, he noted, in slave states it had been "made a felony to teach slaves to read and write." *Ibid.* Senator Wilson of Massachusetts, a strong supporter of the amendment, argued that upon its adoption, "the school-house will rise to enlighten the darkened intellect of a race imbruted by long years of enforced ignorance." *Id.* at 1324. His expectations were shared by many of his fellow senators. Thus, Senator Clark of New Hampshire, also a supporter, asserted that abolition of slavery would bring a new era of prosperity to the southern states, "and on every hand would grow villages and towns with schools and churches, and all the institutions of a higher civilization." *Id.* at 1369.

kinds of contracts that it intended the statute to cover is not a reason for giving Section 1981 such a meaning so restricted that contracts for private education would be excluded. It has been suggested by more than one commentator that, in light of *Jones v. Mayer Co.*, it is necessary to view the principal of freedom established by the Thirteenth Amendment as one of those "[g]reat concepts . . . purposely left to gather meaning from experience." *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting).[11] The relics of slavery survive today in more forms than the Reconstruction Congress could have anticipated, and there is no reason why Sec. 1981 should be limited in application merely because congressional spokesmen at that time did not foresee all the possible forms of contract to which the section might be applicable. Accordingly, decisional law to date reflects a literal reading of the section and its application to a wide variety of contracts. *Johnson v. Railway Express Agency, supra,* 421 U.S. 454 (employment contract); *Scott v. Young,* 421 F.2d 143 (C.A. 4, 1970), cert. denied, 398 U.S. 929 (admission ticket to an amusement park); *Olzman v. Lake Hills Swim Club, Inc.*, 495 F.2d 1333, 1339 (C.A. 2, 1974) (guest privileges in a swimming club); *Grier v. Specialized Skills, Inc.,* 326 F. Supp. 856 (W.D. N.C., 1971) (admission to a privately owned barber trade school); *Amerson v. Jones Law School,* Civil Action 3343-N (M.D. Ala., Aug. 10, 1972) (admission to a privately owned law school); *Sims v. Order of United*

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11 See generally Note, The "New" Thirteenth Amendment: A Preliminary Analysis, 82 Harv. L. Rev. 1294 (1969); Larson, The New Law of Race Relations, 69 Wis. L. Rev. 470 (1969); Kinoy, The Constitutional Right of Negro Freedom Revisited: Some First Thoughts on Jones v. Mayer Co., 22 Rutgers L. Rev. 537 (1968).

Commercial Travelers of America, 343 F. Supp. 112 (D. Mass., 1972) (purchase of an insurance policy); *United States v. Medical Society of South Carolina,* 298 F. Supp. 145, 152 (D. S.C., 1969) (admission of patients to a privately owned hospital); *Hernandez v. Erlenbusch,* 368 F. Supp. 752 (D. Ore., 1973) (admission to a tavern).

Finally, it is significant that whatever question there might once have been about congressional intent in 1866 when Sec. 1981 was enacted, the issue was resolved recently when Congress ratified the modern judicial construction of the statute. As the Court noted in *Johnson v. Railway Express Agency, supra,* 421 U.S. at 459, when amendments were being considered in 1971 to Title VII, the equal employment opportunity provisions, of the Civil Rights Act of 1964 (42 U.S.C. 2000e, *et seq.,* 78 Stat. 253), Congress specifically recognized the parallel remedies for employment discrimination available under Sec. 1981 as the result of recent judicial interpretations of that section. H. Rep. No. 92-238, 92nd Cong., 1st Sess. 18-19 (1971); S. Rep. No. 92-415, 92nd Cong., 1st Sess. 24 (1971). Later, in considering the Equal Employment Opportunity Act of 1972, the Senate rejected an amendment that would have deprived a claimant of any right to sue under Sec. 1981. 118 Cong. Rec. 3172-3173, 3368-3373 (1972). The congressional approval thus manifested of the construction that has been given to Sec. 1981 confirms judicial interpretations as to the scope and validity of the provision. *N.L.R.B. v. Bell Aerospace Co.,* 416 U.S. 267, 275 (1973); *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 381 (1969).

B. There Is no Valid Reason to Exempt Privately Owned Schools from Section 1981.

From the discussion above, it is seen that by enacting the Civil Rights Act of 1866, Congress exercised the power granted to it under the Thirteenth Amendment to abolish all badges and incidents of slavery. The defendant schools and intervenor contend, however, that if Sec. 1981 is construed to prohibit racial discrimination by nonpublic schools it will conflict with the constitutional rights of privacy and freedom of association of parents who send their children to such schools. As we show below, these contentions are without substance.

1. The decisions below accord with this Court's Teachings in *Sullivan* and *Tillman.*

The *Sullivan* and *Tillman* cases, *supra,* involved application of the civil rights laws to cooperatively owned community swimming pools which had many of the attributes of conventional private clubs. The courts below in both cases, after considering the manner in which the associations were operated by their members, and the arguments that were raised of privacy and freedom of association, decided that they were private clubs and hence exempt from the civil rights laws. However, this Court reversed, holding that the question of whether the associations were "truly private" depended on whether they had a "plan or purpose of exclusiveness." *Tillman,* 410 U.S. at 438. Such a plan or purpose was not shown, the Court said, since the establishments were "open to every white person . . . there being no selective element other than race." *Ibid.* Nor, the Court held, was a different result required by the fact that the associations had specified maximum numbers of

members or that membership applications were subject to board of directors approval. *Ibid.*

The instant proceeding falls in the same category as *Sullivan* and *Tillman* and, if anything, the facts here made a more compelling case for Sec. 1981 coverage. For the defendant schools make no pretense at having a "plan or purpose of exclusiveness." Indeed, the exact opposite is true because the record shows that they operate just as any commercial business does, openly advertising for customers. The schools both advertise in the Yellow Pages of the telephone directory and they both distribute advertisements through the mail addressed to "Resident." Any child who is qualified by age and background is eligible to attend, provided the school and his class have capacity to receive him, and provided his parents can pay the required tuition. Although the admission requirements of these schools, like those of any school, are used for determining those qualified to attend, they are not unlike the membership eligibility requirements in *Sullivan* and *Tillman*[12] or requirements of age, dress or behavior that are frequently imposed on customers of business establishments.

Applying the precedents of the *Sullivan* and *Tillman* cases to the facts here, we submit the court of appeals was correct in its conclusion that "When a school holds itself open to the public . . . or even to those applicants meeting established

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[12] In addition to not applying at a time when memberships were at the maximum and having one's application approved by the board of directors, in *Sullivan* and *Tillman*, an applicant was required to reside within a prescribed geographic area, satisfy a minimum age requirement, and pay the initiation fee and annual dues.

qualifications, there is no perceived privacy of the sort that has been given constitutional protection" (A. 15).[13]

The dissenting members of the court of appeals gave no weight to the *Sullivan* and *Tillman* decisions, and would have decided this case adversely to the plaintiffs on grounds that do not withstand analysis. Thus, the dissenters suggest that the relationship between a teacher and student is primarily one of status, rather than contract, and is comparable to the relationship of husband and wife (A. 26). However, the dissenters incorrectly identify the relationship that is at issue here. For each of the defendant schools has an enrollment of about 200 pupils and the relevant relationship is the contractual one between the school, as such, and each of the 200 families. Teachers are employed by each school but teachers do not contract with the school's customers; the school does. Even the relationship between teacher and student in a conventional school setting is not intimate in the sense that the dissenters

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[13] The intervenor refers in its brief to the schools that it represents as "flight schools" or "segregation academies" (Br. 34). Although the record does not disclose how they obtain their students, it is a matter of public record that schools of this description have been established in many communities throughout the southern states to provide schooling for whites fleeing from desegrated public schools. Since the purpose of these schools is to provide an alternative to the public schools at various grade levels, it can be presumed that their admissions are open generally to whites in the areas they serve, and that such a school depends for its continued existence on an incoming group of students at the lower grade levels each year. In 1972, there were over a half million students in such schools in southern states. See Note, Segregation Academies and State Action, 82 Yale L.J. 1436, 1441, n. 44 (1973). Schools of this type, with open-ended enrollments, manifestly are not "truly private" under *Sullivan* and *Tillman* decisions.

characterize it, for teachers often deal with classes ranging up to 20 to 30 students. The relevant relationships thus bear no comparison to the status of a husband and wife. Moreover, it would seem unnecessary to point out that the defendant schools are commercial enterprises engaged in selling a commodity – education – while marriage is a noncommercial relationship.

The dissenting court of appeals judges also seem to have been unduly impressed by what they regarded as the "small" size of the defendant schools and the fact that they are not "huge and impersonal" (A. 30). However, the enrollments of about 200 in each of the defendant schools is comparable in size to the 325 members of the Wheaton-Haven Recreation Association, and size was not a factor that was given any weight by the Court in the *Tillman* case. 410 U.S. at 433. Further, the dissenters' emphasis on the asserted intimacy of the contractual relationships involved here overlooks the closeness that may exist in an employment relationship where an employer has only a few employees; yet there is no reason to believe that Sec. 1981 is not applicable to a small employer. *Johnson v. Railway Express Agency, supra,* 421 U.S. at 459-460. It also is significant that employers with as few as 15 employees are now subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended in 1972 (42 U.S.C. Sec. 2000e, 78 Stat. 253, 86 Stat. 103), but there is no basis for doubting the validity of that statute's coverage.

Finally, the dissenting members of the court of appeals seek to distinguish this case from *Jones v. Mayer Co., supra,* 392 U.S. 409, on the ground that there was an element of "necessity" associated with the plaintiff's purchase of property in that case, whereas, in the dissenters' view, "The same basis of necessity is not available to support

the desire of blacks to attend an all white independent school." (A. 32). Aside from the fact that there is not the slightest indication in the language of the 1866 Act or in this Court's decisions construing it that "necessity" has any relevance to application of the statutory provisions, the dissenting opinion reflects a misunderstanding of the circumstances of this case. Thus, the Gonzales and McCrary families are not financially affluent and thus easily able to afford the luxury of sending their children to private schools. Rather, both Mrs. Gonzales and Mrs. McCrary are working mothers, and at the time of the events herein they required private school facilities for their children in order to retain their jobs (A. 190-191, 226B-226C, Tr. 31, 196). At the time the Gonzales' sought admission for Colin in Fairfax-Brewster School, he was not quite 6 years old and thus was not eligible to enter first grade in public school. After trying unsuccessfully to enroll him in public school, the Gonzales' sought Colin's admission to Fairfax-Brewster so that he would be eligible to continue school in the second grade the following year (A. 176, Tr. 74). Similarly, for the McCrary's it was important to have Michael, who was two years old, in some type of day care program, so after he was denied admission to Bobbe's School, his parents made an alternative arrangement with a nursery school which was a considerable distance – 10 miles – from their home, whereas Bobbe's School was less than a mile (A. 229). The only point of mentioning these facts is to correct the misconception reflected in the dissenting opinion to the effect that since public schools are always available, it is an unnecessary luxury for people to send their children to nonpublic schools. As this case shows, for many families privately operated educational facilities are a necessity, and there is no feasible public school alternative.

2. Governmental regulation of nonpublic schools is commonplace

There is nothing in the nature of nonpublic schools, as such, that makes them exempt from governmental regulation. Indeed, experience shows the opposite to be true, for because of the high value placed on education in our society, and the importance of an educated citizenry to the survival of democratic government, nonpublic schools like public schools, have always been a particular subject of legislative concern. Private educational institutions in this country are the alter ego of the public school system, and therefore the quality of the education that they provide and the values that they transmit are no less important from a societal standpoint than those associated with public school education. It is noteworthy that this policy was recently reflected in the action of Congress when it eliminated the exemption for nonpublic and public educational institutions that had been in Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e-1). In recommending adoption of this change as part of Section 3 of the Equal Employment Opportunity Act of 1972 (P.L. 92-261, 92nd Cong., 2nd Sess.) the House committee reporting out the legislation stated (H. Report No. 92-238, 92nd Cong., 1st Sess. 20 (1971)):

> The committee feels that discrimination in educational institutions is especially critical. The committee can not imagine a more sensitive area than educational institutions where the Nation's youth are exposed to a multitude of ideas that will strongly influence their future development. To permit discrimination here would, more than in any other area, tend to promote misconceptions leading to future

> patterns of discrimination. Accordingly, the committee feels that educational institutions, like other employers in the Nation, should report their activities to the Commission and should be subject to the provisions of the Act. [13]

The effect of this amendment is to extend Title VII to all schools with 15 or more employees, and since each of the defendant schools has more than that number,[14] they, as well as other nonpublic schools of at least that size are now prohibited from engaging in discriminatory employment practices on the basis of race, color, religion, sex or national origin. Since there is no reason to question the validity of this extension of Title VII to nonpublic schools, it would be ironical if it resulted in the schools at issue herein being required to hire qualified black personnel for faculty positions, while at the same time they were to prevail in their contention that they were entitled to maintain all-white student bodies.[15]

In *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925), the Court specifically recognized the power of a state government:

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13 Also see S. Report No. 92-415, 92nd Cong., 1st Sess. 11-12 (1971).

14 This is shown by answers to interrogatories filed by Bobbe's School, and because Fairfax-Brewster has the larger enrollment, it presumably has more than 15 employees too.

15 For that matter, Sec. 1981 itself prohibits the schools herein from discriminating on the basis of race in employment matters. *Johnson v. Railway Express Agency, supra*, 421 U.S. at 459-460.

> reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

Similarly, in *Meyer v. Nebraska,* 262 U.S. 390, 402 (1923), the Court affirmed the "power of the State to compel attendance at some school and to make reasonable regulations for *all* schools, including a requirement that they shall give instructions in English . . ." (Emphasis added.)

State laws imposing reasonable regulations on privately owned educational institutions take a variety of forms, and they have been recognized as a proper exercise of the police power. See, *e.g., Schneider v. Pullen,* 198 Md. 64, 81 A.2d 226 (1951); *Packer Collegiate Institute v. University of State of N.Y.,* 273 App. Div. 203, 76 N.Y.S. 2d 400 (1948), rev'd on other grounds, 298 N.Y. 184, 81 N.E. 2d 80. In North Carolina, to cite one such law in a jurisdiction where intervenor represents a group of schools,[16] the state board of education is authorized by statute to supervise all nonpublic schools to see that they meet minimum standards set by the state and that children who attend them are taught the same courses as children of corresponding age and grade in the public schools.[17] The North Carolina statute further requires that standards in nonpublic schools concerning promotion of pupils, grade levels and courses of instruction for each grade correspond to those in public schools. Standards relating to qualifications and certification of teachers in public schools are also applied to nonpublic schools. Three other states where intervenor represents schools, Georgia, Mississippi, and South Carolina, are examples of jurisdictions that have adopted comprehensive statutes regulating so-called proprietary schools.[18] These laws, which are usually applicable to trade, technical, industrial and business schools, provide, *inter alia,* for state licensing conditioned on the school's meeting standards governing such matters as financial stability, course offerings, qualifications of personnel, and adequacy of physical facilities. Such schools are required to be bonded and their sales representatives must also be licensed and bonded.

Government concern for the quality of education provided by privately owned schools is best illustrated in jurisdictions with compulsory school attendance laws. All of the states where there are schools represented by intervenor have compulsory attendance laws, except Mississippi.[19] Such laws require all children in the state to attend public or nonpublic school for a specified number of years, typically between the ages of 7 and 16, for the entire length of the

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[16] It is reported that there are 395 schools affiliated with intervenor located in the states of Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Virginia. Note, Segregation Academies and State Action, 82 Yale L.J., *supra,* at 1448, n. 70.

[17] N.C. Gen. Stat. Secs. 115-255, 115-256 (1975).

[18] Ga Code Ann. Secs. 32-2301b, *et seq.* (Supp. 1975); Miss. Code Tit. 75, Ch. 60 (Supp. 1975); S.C. Code Secs. 21-750, *et seq.* (Supp. 1974).

[19] Ala. Code tit. 52, Secs. 297, 299 (1958); Ga. Code Ann. Sec. 32-2104 (1969); La. Stat. Ann. Sec. 17:221 (Supp. 1975); N.C. Gen. Stat. Sec. 115-166 (1975); S.C. Code Sec. 21-757 (Supp. 1974); Va. Code Sec. 22-275.1 (Supp. 1975).

school term. Usually, it is provided also that nonpublic schools must prepare reports to be submitted to local school superintendents containing the names, addresses, and parents' or guardians' names for children that are enrolled, and, in addition, daily attendance records must be kept and compiled for periodic reporting to local school officials. In a number of states, Alabama, for example, the law goes further and provides that in order for a child's enrollment in a nonpublic school to satisfy the compulsory attendance law, the school must conform to state standards applicable to public schools governing such matter as curriculum and the qualifications of teachers. South Carolina's compulsory attendance law has a similar requirement. In Virginia the statute requires that any tutor or teacher who teaches a child subject to the compulsory attendance law must meet qualification standards prescribed by the state board of education.

The intent of these laws obviously is to insure that children, whether they go to public or privately owned schools, will obtain an equivalent education.[20] The state, by this means, is exercising its authority as *parens patriae* of immature children to require public and nonpublic schools to conform to the same minimum educational

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20 The equivalency requirement of compulsory attendance laws has been upheld in numerous decisions. See, *e.g., Rice v. Commonwealth,* 188 Va. 224, 49 S.E. 2d 342 (1948); *Meyerkorth v. State,* 173 Neb. 889, 115 N.W. 2d 585 (1962); *Shapiro v. Dorin,* 199 Misc. 643, 99 N.Y.S. 2d 830 (1950), aff'd, 278 App. Div. 705, 103 N.Y.S. 2d 757, aff'd, 302 N.Y. 857, 100 N.E. 2d 48, app. dism., 342 U.S. 884; *People v. Turner,* 121 Cal. App. 2d 861, 263 P.2d 685 (1953), app. dism., 347 U.S. 972; *State v. Hoyt,* 84 N.H. 38, 146 Atl. 170 (1929); *State v. Superior Court,* 55 Wash. 2d 177, 346 P.2d 999 (1959).

standards. The net effect of such laws, as the Nebraska Supreme Court has said, is that both "[p]rivate and parochial schools are a part of the educational system of [the] state." *Meyerkorth v. State, supra,* 115 N.W. 2d at 595. Through such laws, state legislatures have created a unified educational system in which the nonpublic school, as surrogate for the public school system, is required to provide an educational program for children that is substantially equivalent to that provided by the public system.

Recent years have also seen the enactment by a number of states of anti-discrimination laws covering nonpublic schools. These laws provide a precedent for application of Sec. 1981 to such schools as a guarantee against racially discriminatory admission practices.[21] Several of the state laws are based on the Comprehensive Anti-Discrimination Act promulgated by the National Conference of Commissioners on Uniform State Laws (1966 Handbook) which

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21 See Idaho Code Secs. 67-5902(10), 67-5909(6) (1973); Ind. Ann. Stat. Secs. 22-9-1-2(a), 22-9-1-3(1) (Burns 1974); Mass. Ann. Laws ch. 151C, Sec. 1(b)(Supp. 1974); Minn. Stat. Ann. Secs. 363.01 Subd. 20, 363.03 Subd. 5 (Supp. 1974); Mont. Rev. Code Ann. Secs. 64-305(4), 64-306(6) (Supp. 1974); N.J. Stat. Ann. Sec. 10:5-5(1) (Supp. 1975); N.Y. Educ. Law Sec. 313(2), Exec. Law Sec. 296-4 (McKinney Supp. 1974); S. Dak. Comp. Laws Ann. Secs. 20-13-1(11), 20-13-22 (Supp. 1975); V.I. Code Ann. tit. 10, Sec. 2 (1966); Wash. Rev. Code Ann. Secs. 9.91.010, 49.60.040 (1974). Several other states have anti-discrimination statutes limited primarily to vocational and trade schools. See Colo. Rev. Stat. Ann. Secs. 24-34-302(13), 24-34-306(f) (1973); Ill. Ann. Stat. ch. 16 3/4, Secs. 14.40, 18a (Smith-Hurd 1972); Ky. Rev. Stat. Ann. Secs. 163.320(2), 163.340(6) (Supp. 1974); Ore. Rev. Stat. Sec. 345.240 (1974); Pa. Stat. Ann. tit. 24 Sec. 5003(1)(1974); Utah Code Ann. Secs. 34-35-2(11), 34-35-6(f) (Supp. 1973).

makes it unlawful for a public or private educational institution:

> to exclude, expel, limit, or otherwise discriminate against an individual seeking admission as a student or an individual enrolled as a student in the terms, conditions, and privileges of the institution, because of race, color, religion, or national origin.

Although there does not appear to have been a definitive court test of state anti-discrimination legislation as applied to nonpublic schools, a commentary on such laws notes that "it seems far-fetched to argue that the states are powerless to forbid discrimination in education."[22]

3. There is no constitutional reason why Section 1981 is inapplicable to nonpublic schools

The defendants and intervenor argue in substance that application of Section 1981 to nonpublic schools will abridge the rights of freedom of association and privacy of parents who send their children to such schools. The intervenor makes an additional argument to the effect that parents who select an all-white school because of a belief that "segregation is desirable in education" are engaged in a form of expression that is constitutionally protected (Br. 27).

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[22] 2 Emerson, Haber and Dorsen, Political and Civil Rights in the United States 1793 (1967). See generally, Note, Fair Educational Practices Acts: A Solution to Discrimination? 64 Harv. L. Rev. 307 (1950). In *Vantine v. City of Tulsa,* Okla. Cr., 518 P.2d 316 (1973) a preschool was held to be a public accommodation, and hence subject to a municipal anti-discrimination ordinance.

As an initial matter it should be noted that these contentions are erroneous to the extent that they stem from an assumption that parents have an unfettered right to determine how their children are to be educated. The error is clearly demonstrated by the cases referred to *supra,* p. 32, upholding the constitutionality of compulsory school attendance laws. In each of the cited cases a child's parents claimed dissatisfaction with public school education and asserted that they were able to provide what they considered a superior education either at home or through a program of non-certificated private teaching. The courts have uniformly rejected such assertions, and have upheld the right of states to require that in lieu of attending public school a child must be educated under conditions fixed by the state, *i.e.,* where the curriculum, or teacher, or both, have been approved by the state. As the Supreme Court of New Hampshire stated (*State v. Hoyt, supra,* 146 Atl. at 171):

> The defendants' claim that the federal guaranty of liberty enables them to set at defiance any attempt of the state to prescribe the means for ascertaining the sufficiency of educational facilities furnished and to be furnished as a substitute for the public school, goes far beyond anything that has been decided to be the law.

Outside of the educational context this Court also has recognized that government, acting within the range of its powers, may substantially limit parental freedom in matters affecting children. Thus, in *Prince v. Massachusetts,* 321 U.S. 158 (1944), a Jehovah's Witness appealed from a conviction for violating the child labor law by conduct – distributing religious tracts on the streets with her

daughter – which she claimed was an exercise of her religious convictions. The Court acknowledged that the state's enforcement of its law conflicted with the parent's control and religious training of the child, thus threatening vital constitutionally protected interests, but held that against those "sacred private interests, basic in a democracy" stand the interests of society to protect the welfare of children. 321 U.S. at 165. The Court further stated (321 U.S. at 166-167):

> And neither the rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways . . . . It is sufficient to show . . . that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience and religious conviction.

Defendants and the intervenor, in support of their position, attempt to read far more into *Pierce v. Society of Sisters, supra,* 268 U.S. 510, than is warranted. The Court there held an Oregon law to be invalid which required all children to attend public schools and which therefore would have had the "inevitable practical result" of destroying all private schools in the state. 268 U.S. at 534. The Court held that the law resulted in an improper taking of the property of private schools, and that it interfered with the right of parents to send their children to such schools if they wished. However, as noted *supra,* pp. 29-30, the Court specifically acknowledged "the power of the state

reasonably to regulate all schools . . ." 268 U.S. at 534. The defendants and intervenor attempt to equate the Court's holding in *Pierce* that parents have a right to send their children to nonpublic schools, with the proposition that the government may not regulate the operation of such schools. Obviously, this is a baseless suggestion. Government's role as a regulator is a familiar one and is always subject to the limitation of reasonableness. But to regulate private schools is manifestly not the same as prohibiting children from attending them or destroying them entirely, as the Oregon law would have done. The Court recently had occasion to observe that "*Pierce* is not without limits . . . [it] held simply that while a State may posit [educational] standards, it may not pre-empt the educational process by requiring children to attend public schools." *Norwood v. Harrison,* 413 U.S. 455, 461 (1973).

The defendants and intervenor also rely heavily on language in *Norwood v. Harrison, supra,* 413 U.S. at 469, and *Green v. Connally,* 330 F. Supp. 1150, 1166 (D.D.C., 1971), aff'd *sub nom., Coit v. Green,* 404 U.S. 997, to support their contentions. That reliance is misplaced, however, for neither case constitutes a ruling on the issue presented here. *Norwood,* in fact, is support for plaintiffs' position more than any other. Thus, although the Court there notes that "private bias is not barred by the Constitution" and that some persons may prefer racially segregated schools for their children, the Court further observes that the Constitution "places no value on discrimination" as it does other specified rights. 413 U.S. at 469-470. Continuing in terms that foreshadow plaintiffs' position in the case at bar, the Court states (*id.* at 470):

> Invidious private discrimination may be characterized as a form of exercising freedom of

association protected by the First Amendment, but it has never been accorded affirmative constitutional protections. And even some private discrimination is subject to special remedial legislation in certain circumstances under §2 of the Thirteenth Amendment; Congress has made such discrimination unlawful in other significant contexts[10]

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10 See, *e.g. Griffin v. Breckenridge,* 403 U.S. 88 (1971); *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409 (1968); 42 U.S.C. §2000a *et seq.* (barring discrimination in public accommodations); 42 U.S.C. §2000e, *et seq.* (barring discrimination in private employment); 42 U.S.C. §3601 *et seq.* (barring discrimination in private housing transactions).

The opinion of the three-judge district court in *Green v. Connally, supra,* similarly is more supportive of plaintiffs' position here than of defendants'. The court there held that it was unconstitutional for the Internal Revenue Service to grant tax exemption to private racially segregated schools and to allow taxpayers to take deductions for gifts to such institutions. Further, the court specifically rejected the schools' contention that they had a constitutionally protected right to discriminate and that it was therefore impermissible for the Government to condition receipt of tax benefits on their adherence to nondiscriminatory policies. While acknowledging the general right of association exercised by those who send their children to segregated private schools, the Court held that to the extent that there was a conflict, that associational right had to give way to the "compelling as well as . . . reasonable government interest in the interdiction of racial discrimination which stands on highest constitutional

ground, taking into account the provisions and penumbra of the Amendments passed in the wake of the Civil War." 330 F. Supp. at 1167.

Gilmore v. City of Montgomery, 417 U.S. 556 (1974), which defendants and intervenors cite, likewise provides no support for their contentions. The Court there held that it was improper under the Fourteenth Amendment for the city to provide aid to discriminating private schools by allowing them exclusive use of municipal recreational facilities. There is dictum in the Court's opinion referring to the "associational rights which our system honors" which permit individuals to join "clubs" with exclusionary policies, but the Court's remarks do not refer to schools. 417 U.S. at 575. Further, the Court, citing *Norwood v. Harrison, supra,* repeats its view that the right to discriminate "is not subject to affirmative constitutional protection." *Ibid.*

The clear lesson to be drawn from this Court's decisions is that although parents have a constitutionally protected right to send their children to nonpublic schools, that right is unrelated to the recognized right that every citizen has to engage in associational activity without government interference. The constitutionally protected right of association evolved from a need to protect individuals who joined with others for the expression or promotion of political or social ideas.[23] Since the right of association is closely linked to the freedom of speech and assembly, governmental interference with associational freedom bears a heavy burden of justification. However, freedom of

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23 See *NAACP v. Alabama,* 357 U.S. 449, 460-466 (1958); *United States v. Robel,* 389 U.S. 258, 263-268 (1967); *Shelton v. Tucker,* 364 U.S. 479, 485-487 (1960); *Healy v. James,* 408 U.S. 169, 181 (1972).

association, as it has been recognized in the decided cases, is not an exclusionary concept and, indeed, the exclusion of individuals is normally antithetical to the strength that is gained from numbers when associations are formed to promote political or social ideas. Moreover, freedom of association has no relevance to a school which has as its purpose the education of children, for schools, as such, are normally apolitical. Although the Constitution is a barrier against governmental interference with an individual's right of free speech and concomitant political activity, as shown above, the regulation of schools by the government is permissible. Moreover, the justification for such regulation in the circumstances presented by this case is particularly compelling since its purpose is to effectuate the constitutional mandate embodied in the Thirteenth Amendment.

The right of privacy as it is recognized by the decisions of this Court likewise provides no justification for the discriminatory policies of the schools involved here. The cases have established the right to freedom from government intrusion in specific situations involving the family, procreation and the home.[24] The court of appeals pointed out below that, "The right is appropriately recognized in certain instances when only a few people are involved in activity unintended for the public view." 515 F.2d at 1088. Accordingly, as the court held, "Though certain intimate and private affairs of men and women are protected from governmental interference, the schoolhouse is far from the realm of protection." *Ibid.* There is no

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[24] See *Roe v. Wade*, 410 U.S. 113, 152-154 (1973); *Eisenstadt v. Baird*, 405 U.S. 438, 452-455 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564-568 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

question but that the record of this case supports the court's conclusion. Further, as shown *supra*, the schools involved herein lack the characteristic of exclusiveness that would make them "truly private" under this Court's decisions in *Sullivan* and *Tillman, supra*.

The intervenor asserts (Br. 25-27) that parents who believe that "segregation is desirable in education" have a constitutionally protected right to express that belief by sending their child to an all-white school. This argument is highly theoretical, since there is no evidence of record that any parents are in fact engaged in expressing such a belief; and the defendant schools do not even make the argument. Assuming *arguendo*, however, that it is an expressive act to send a child to a segregated school because of a belief that this is a desirable form of education, that does not necessarily entitle the act to constitutional protection. For such conduct is more action than expression, and hence it is more susceptible to governmental restriction than pure speech. *United States v. O'Brien*, 391 U.S. 367, 376 (1968); *Eisenstadt v. Baird, supra*, 405 U.S. at 458 (Douglas, J., concurring). The asserted right to send a child to a segregated school, therefore, stands on no stronger a footing than rights that individuals have heretofore claimed to live in a segregated neighborhood eat in a segregated restaurant, stay at a segregated hotel, or attend a segregated theater. As shown *supra*, there is no longer any question but that such rights must yield to the national policy expressed in the Thirteenth Amendment that requires eradication of the badges and incidents of slavery.[25]

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[25] A motion has been filed with the Court by Dade Christain Schools requesting leave to file a brief herein as *amicus curiae* in support of the defendants, but as of the time the instant brief is

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Finally, apart from the force of the Thirteenth Amendment itself, the public interest justifying application Section 1981 to privately owned schools and thereby extending to that sector of our educational system the same prohibition against racial discrimination that exists in the public sector was aptly stated in the recommendations of the U.S. National Advisory Commission on Civil Disorders (p. 438, Bantam ed. 1968):

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25 (continued)
written the *amicus* brief has not been filed, in apparent violation of the Court's Rule 42. In any event, Dade asserts in its motion that its interest in the case is unique because, unlike the other schools in the proceeding, its policy of excluding black students "is founded upon religious beliefs"(Motion 5). Dade refers further to a proceeding brought against under Sec. 1981 in the United States District Court, Southern District of Florida, in which it was enjoined from refusing admission to children on racial grounds. *Brown v. Dade Christian Schools, Inc.*, No. 73-1313-Civ.-JE), appeal pending in the United States Court of Appeals for the Fifth Circuit (No. 75-3260). In that district court proceeding, in a decision rendered May 27, 1975 (unreported) Judge Joe Eaton held that although Dade had a discriminatory "philosophy and policy" it was not a "fundamental religous tenet," and therefore the Free Exercise Clause was not involved. The issue, therefore, is not presented in this proceeding of whether a religious basis for a school's discriminatory practices could ever validly be asserted as a shield against the thrust of the Thirteenth Amendment. However, so that their position on the issue is clear plaintiffs point out, first, that the decision in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which would have a bearing on the issue, set a standard that would be difficult to meet. The Court there granted children of the Amish sect over age 14 an exemption from Wisconsin's compulsory school attendance laws on the ground that attendance to age 16 as the law provided was contrary to the beliefs of the Amish religion. The Court held that this limited exemption for the sect was warranted on the basis of the "almost 300 years of consistent practice and strong
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> [W]e believe school integration to be vital to the well-being of this country.
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> We support integration as the priority education strategy because it is essential to the future of American society. We have seen in this last summer's disorders the consequences of racial isolation, at all levels, and of attitudes toward race, on both sides, produced by three centuries of myth, ignorance and bias. It is indispensable that opportunities for interaction between the races be expanded. The problems of this society will not be solved unless and until our children are brought into a common encounter and encouraged to forge a new and viable design of life.

II. THE INJUNCTIVE RELIEF GRANTED BY THE DISTRICT COURT AGAINST FAIRFAX-BREWSTER SCHOOL IS VALID AND PROPER

Fairfax-Brewster (Br. 69-70) challenges the propriety of the injunctive issued against it by the district court, but as

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25 (continued)
evidence of a sustained faith pervading and regulating [the members'] entire mode of life" 406 U.S. at 219. It is doubtful if comparable justification could be shown for relief from an anti-discrimination law by any group espousing racial segregation as a religious tenet. In any event, even if a religious basis for such views could be shown, it is submitted that they would be of necessity have to yield to the strong public policy against the practice of racial discrimination embodied in the Thirteenth Amendment. *Prince v. Massachusetts, supra*, 321 U.S. at 166; *Reynolds v. United States*, 98 U.S. 145, 166-167 (1878); *Davis v. Beason*, 133 U.S. 333, 344 (1890).

we show below, its argument is without merit.[26]

The complaint filed by the Gonzales' against Fairfax-Brewster alleged that the school had discriminated against plaintiffs because they are Negroes, and that the plaintiffs were bringing the action on their own behalf and on behalf of all similarly situated Negroes, pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure (A. 48). Other allegations were included in paragraph 3 of the complaint setting forth the prerequisites for a Rule 23 class action (*ibid.*). The prayer for relief sought a declaration of illegality as to Fairfax-Brewster's discriminatory admission policy and requested an order enjoining the school from continuing to discriminate on the basis of race with respect to the admission of children to its programs (A. 50-51). Although the injunctive order issued by the district court grants the class action relief requested by plaintiffs, there is an inconsistency between the order and the court's opinion in which it specifically declined to hold that the case could be maintained as a class action (A. 138). Even though the district court would appear to have been mistaken in refusing to find this to be a class action, it was harmless error, since the injunctive order is a proper remedy in the circumstances.

As shown *supra*, Fairfax-Brewster's refusal to accept Colin Gonzales for admission was obviously not for any reason that related to him individually, but was because of his race – a class characteristic. It has been noted that "Racial discrimination is by definition class discrimination . . ." *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 499 (C.A. 5, 1968); *Bowe v. Colgate-Palmolive Co.*, 416

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[26] The matter was not discussed in the opinion of the court of appeals where the issue was also raised.

F.2d 711, 719 (C.A. 7, 1969). Rule 23(b)(2) was specifically designed to provide full and effective relief in an action such as this, which seeks redress not just for an individual discriminatee but is intended to eliminate an unlawful policy of general applicability. See Notes of Advisory Committee on Rules of Civil Procedure, 39 F.R.D. 69, 102 (1966); Wright and Miller, Federal Practice and Procedure Secs. 1771, 1776; 3B Moore's Federal Practice Par. 23.40; *Barnett v. W.T. Grant Company*, 518 F.2d 543, 547-548 (C.A. 4, 1975); *Rodriguez v. East Texas Motor Freight*, 505 F.2d 40, 50 (C.A. 5, 1974); *Rich v. Martin Marietta Corp.*, 522 F.2d 333, 340 (C.A. 10, 1975). On the basis of the district court's finding that Colin Gonzales was discriminatorily denied admission to Fairfax-Brewster School because of his race, the court properly framed its order to enjoin the school not only from discriminating against him but from continuing to discriminate against others as well. "Where pervasive racial discrimination is demonstrated, the court has not only the power, but also the duty, to render a decree eliminating the effects of past discrimination and ensuring equal opportunity in the future." *Watkins v. Washington*, 472 F.2d 1373, 1376 (C.A.D.C., 1972).

The validity of the district court's injunctive order is not impaired by the fact that Fairfax-Brewster's program only goes through the sixth grade and Colin is now beyond the age where he would be eligible to attend the school. The evidence shows that after his rejection by the school, Colin's parents made alternative arrangements for him. For two years, he attended Congressional School, a privately owned school, and the following two years he attended a parochial school. Shortly, before issuance of the district court's injunction, the Gonzales' moved to another county, where they planned to enroll Colin in

public school (A. 182-184). Fairfax-Brewster's objection to the district court's injunction, therefore, raises the question whether the dispute underlying the injunction was moot either at the time the order issued or is now moot.[27] It is clear, however, that at the time the injunction was issued by the district court the underlying dispute was not moot, since Colin still had two more years in which he was eligible to attend Fairfax-Brewster and there was always the possibility of his family's returning to the area and again seeking his admission to the school. In addition, when the injunction was issued and at all time since, the Gonzales' have represented the class of other Negroes who might seek admission to Fairfax-Brewster. It cannot be contended that the dispute is moot as to the class. As the Court recently held, even where the claim of a named plaintiff has become moot, injunctive relief is still warranted if the controversy between a named defendant and members of the class still exists. *Sosna v. Iowa,* 419 U.S. 393, 398-403 (1974), and cases cited at n. 10.

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[27] It should be noted that the dispute between the parties concerning the district court's award of damages to Colin is still alive in any event. Because of his status as a minor, Colin's claim for damages was not barred by the statute of limitations, as the district court held was the case with his parents, *supra*, p. 7.

CONCLUSION

For the foregoing reasons, plaintiffs submit that the conclusions of the court of appeals with respect to the issues presented herein should be affirmed.

Respectfully submitted,

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